No. 122.

Petition for Rehearing.

Rec'd & Dist'd Mar. 21, 1902.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

OFFICE SUPREME COURT of U. S.
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MAR 21 1902

CLEMENT STUDEBAKER,
Plaintiff in Error,
vs.
JOHN PERRY, Receiver of the National Bank of Kansas City,
Defendant in Error.

No. 122.

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

HUGH C. WARD,
Attorney for Plaintiff in Error.

JOHN C. BOYARD, PRINTER, N. Y. LIFE BLDG., KANSAS CITY, MO.

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PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

Now comes the plaintiff in error and respectfully petitions the Court to grant a rehearing in this cause for the following reason:

The opinion rendered herein on its face is inconsistent, illogical and contrary to law, in that considerations of inconvenience and hardship, which are only applicable in the construction of statutes of doubtful language, are applied in construing sections 5151 and 5234 R. S. U. S., while the principle of practical and contemporaneous construction likewise applicable in the construction of such statutes, is denied application on the ground that said sections are plain and free from doubt in their meaning.

In our original brief filed in this case we demonstrated by the decisions of this Court that the obligation of national bank shareholders is to pay the par value of their stock on demand of the comptroller if the assets of their bank are insufficient to pay its debts and obligations no matter how little the deficiency may be. In other words, it is and was our contention, that the comptroller of the currency has the absolute right to collect the full amount of the liability of national bank shareholders in the event of insolvency of their bank. The court, in its opinion, does not deny this proposition but says:

"Such may be the true construction of the statute; but, defeating, as it would in the case supposed, the main and obvious purpose of the enactment, such a construction will only be made by a court when compelled by the necessary meaning of the language. The inconveniences that would be occasioned by the meaning proposed are so great and obvious as to lead us to expect to find that a reasonable construction of the law does not require us to adopt it.

"If it be the duty of the Comptroller to give the creditors of an insolvent national bank the remedy providing for the individual liability of the shareholders, and if the law be that he can do so by one assessment only, then he must, no matter what the condition of the bank may appear to be, make an assessment upon the shareholders up to the entire amount of their liability. In many instances, the value of the bank's assets might make it altogether probable that but a small portion of the shareholders' contribution would be needed. To require payment in full of money which might be held for years while the bank's affairs were being wound up, and then be returned without interest, would certainly be a hardship upon the shareholders. If, to avoid that hardship, the Comptroller should postpone the assessment until he could fully inform himself of the condition of the bank's

affairs, in the time that might thus elapse, some of the stockholders might become insolvent or remove their property from the reach of legal proceedings, and thus a loss be thereon upon the creditors.

"There is nothing in the language of the sections involved to compel us to adopt a view of the law which would result in such manifest inconveniences."

It will thus be seen that the court refused to construe sections 5151 and 5234 R. S. U. S., to authorize but one assessment, on grounds of inconvenience and hardship. It is not claimed that said sections anywhere expressly authorize the comptroller of the currency to make successive assessments and that rules of constructions are therefore inapplicable, nor is it claimed that said sections do not authorize the comptroller to collect the full amount of the personal liability of shareholders of insolvent banks in the first instance. It is simply said that there is nothing in said sections to compel the court to construe these sections to authorize only one assessment and that as such a construction might occasion hardship on the stockholders and cause inconvenience, it will be rejected. Considerations of inconvenience and hardship have been applied by this court in construing these sections, and in doing so this court has admitted that these sections do not clearly and expressly authorize the comptroller of the currency to make successive assessments.

It is settled law that considerations of evil and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and

doubtful, but not when it is plain and explicit. (Sutherland on Statutory Constriction, Sec. 324 and cases cited.)

In Sutherland on Statutory Construction at Sec. 324, it is said:

"The argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were probably not contemplated by the framers."

In *Reg. v. Tonbridge Overseers*, L. R. 13 Q. B. Div., 342, the master of rolls said:

"With regard to inconvenience, I think that is a most dangerous doctrine. I agree if the inconvenience is not only great but what I may call absurd inconvenience, by reading an act in its ordinary sense, whereas, if you read it in a manner in which it is capable of being read, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning."

The same has been said of listening to hardship. (Sutherland on Statutory Construction, Sec. 324).

It will thus be seen that considerations of inconvenience and hardship are only applicable in the construction of statutes ambiguous in their meaning. So, it must be conceded that this court must have regarded these sections of doubtful meaning and as susceptible of two constructions; one for which we contend, and the one given them by the court.

It will be remembered that in our original brief we also contended that the practical construction placed upon these sections by the comptroller of the currency, for more than thirty years, ought to have great influence if not a controlling one in a decision of this case. This court met our contention in this language:

"That the language of the statute under consideration is plain and its construction free from doubt are sufficiently shown by the decisions of the courts heretofore cited; and it would be absurd to claim that the plaintiff in error bought his stock in a national banking association with a right to rely on the contingency that the comptroller might inadvertently or mistakenly make an insufficient assessment should the bank become insolvent."

In other words, this court applies, first, considerations of inconvenience and hardship in construing these sections, which considerations are only applicable to doubtful and ambiguous statutes and then disposes of the principle of contemporaneous and practical construction, invoked by us, by saying that these very sections, which this court treated and regarded as open to two constructions in the first part of its opinion, are so plain and explicit that such principle is without application.

If these sections are of doubtful meaning, as this court admits in its opinion by applying considerations of inconvenience and hardship in a construction thereof, then the principle of practical and contemporaneous construction ought to have great weight in a decision of this case.

Construing sections 5151 and 5234, supra, strictly, as the authorities say, they must be construed; it certainly cannot be said that they clearly authorize successive assessments, and if they do not, the uniform practical construction thereof by the comptrollers of the currency for more than thirty years, acquiesced in as it has been for that length of time by congress, ought not to be disturbed and set aside at this late date, by this court, *simply on grounds of inconvenience and hardship, which we have seen, is a most dangerous doctrine.*

In *Robertson v. Downing*, 127 U. S., 613, this court said:

"This construction of the department has been followed for many years, without any attempt of congress to change it, and without any attempt, so far as we are advised, of any department of the government to question the construction except in the present instance. The regulations of a department of the government is not, of course, to control the construction of an act of congress when its meaning is plain, but when there has been a long acquiesence in a regulation, and by its rights of third parties, for many years, have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

And in still a later case, decided by this court, it was said:

"A regulation of a department, however, cannot repeal a statute; neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the treasury department has not been uniform. The construc-

tion contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to-wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons." (*Merritt v. Cameron*, 137 U. S., 542.)

We, therefore, respectfully submit that these sections ought not to be regarded as of doubtful meaning that considerations of inconvenience and hardship may be applied in a construction thereof, and at the same time, plain and free from doubt that the rule of contemporaneous and practical construction may be held inapplicable in a construction thereof.

HUGH C. WARD,
Attorney for Plaintiff in Error.

I, Hugh C. Ward, do certify that I am counsel for Clement L. Studebaker, plaintiff in error in the above entitled cause, and that in my opinion the foregoing petition for rehearing is well founded in point of law and is made in sincerity and good faith.

HUGH C. WARD,
for Petitioner.